

SERVICE DATE – DECEMBER 29, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34502

AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC–  
PETITION FOR DECLARATORY ORDER

Decided: December 27, 2005

By petition filed on April 30, 2004, American Orient Express Railway Company LLC (AOERC) asked the Surface Transportation Board (Board or STB) to declare that AOERC is not a rail carrier subject to the Board's jurisdiction. A decision instituting a declaratory order proceeding and requesting comments on AOERC's petition was served and published in the Federal Register (69 FR 35130) on June 23, 2004 (June 23 decision).<sup>1</sup> On October 4, 2005, AOERC notified the Board that the Railroad Retirement Board (RRB) plans to issue its final coverage determination regarding AOERC. UTU/GO-386 replied to AOERC's filing. Having reviewed the record, we find that AOERC is a rail carrier subject to our jurisdiction. However, we will exempt AOERC from our licensing requirements, as discussed below.

BACKGROUND

RRB Proceedings. On February 9, 2001, the RRB issued a decision concluding that AOERC is a covered employer for purposes of the Railroad Retirement Act, 45 U.S.C. 231 et seq., and Railroad Unemployment Insurance Act, 45 U.S.C. 351 et seq. (collectively, Railroad Retirement Acts) on the ground that AOERC is a "reincarnation" of a previously covered sleeper car carrier. AOERC sought reconsideration of that decision. The RRB appointed a Hearing Examiner, who, on May 21, 2002, held a hearing on the petition for reconsideration.

---

<sup>1</sup> On July 9, 2004, American Association of Private Railroad Car Owners, Inc., filed comments in support of AOERC's petition. On July 13, 2004, comments opposing AOERC's petition were filed by John D. Fitzgerald, on behalf of United Transportation Union-General Committee of Adjustment, GO-386 (UTU/GO-386); Rail Labor Division of the Transportation Trades Department, AFL-CIO; and United Transportation Union. On August 10, 2004, AOERC filed a reply to the comments. On August 12, 2004, UTU/GO-386 filed a motion to strike AOERC's reply or for leave to respond by filing a reply to a reply. On August 20, 2004, AOERC filed a pleading in opposition to the motion to strike. In the interest of a more complete record and because no party will be prejudiced, we will deny the motion to strike and accept AOERC's August 10 filing and UTU/GO-386's August 12 response.

On May 16, 2003, the Hearing Examiner recommended that the RRB find that AOERC is a covered employer not because it is a “reincarnation” of a covered sleeper car carrier but because it is a common carrier providing rail transportation subject to STB jurisdiction. The Hearing Examiner looked across different modes of transportation to make his common carrier determination and concluded that “[t]he act of holding out [transportation] as a common carrier creates the obligation owed to the public to follow through with the promised service.” Hearing Examiner Recommendation at 40 (May 16, 2003). Based on his view of the facts before him, the Hearing Examiner concluded that AOERC holds itself out to transport a segment of the public for compensation and is, therefore, a common carrier.

The RRB has not acted on the petition for reconsideration or on the Hearing Examiner’s recommendation. Instead, it has stayed its decision to allow the STB to rule on the scope of our jurisdiction.<sup>2</sup>

AOERC’s Operations. AOERC describes itself as a land excursion company that uses restored vintage railroad coaches, diners and sleepers as the home base for the various 4-, 7-, and 10-day vacation packages that it offers. AOERC operates seasonally and does not offer trips over set routes. All of the vacation packages are offered as one-way excursions, and at the end of an AOERC-arranged trip each customer is responsible for finding his or her own transportation back to the tour origination city or home. Additionally, AOERC may cancel a planned excursion if there are not enough customers or it may add a charter trip on a different route.

AOERC sells the tickets to its customers but contracts with the National Railroad Passenger Corporation (Amtrak) to provide locomotive power and train and engine crews (Amtrak Contract). Amtrak typically operates through trackage rights that it obtains from other railroads. Amtrak pulls AOERC’s vintage rail cars pursuant to a schedule for each excursion that meets the availability of both Amtrak and the host railroad (the track owner or operator). AOERC proposes itineraries to Amtrak, usually 2 years in advance, so that Amtrak can determine, based on its own schedule and the availability of the track routes requested, whether they are possible. AOERC cannot offer itineraries that have not been approved by Amtrak. Even if an itinerary has been approved, the Amtrak Contract gives Amtrak the right to cancel or change routes, stops or entire trips.

Under the Amtrak Contract, AOERC is responsible for providing its car consists in good order and on time to meet the schedules of Amtrak and host railroads. Additionally, the consists must be submitted to Amtrak for inspection at the beginning of each touring season and before each trip. Amtrak may refuse to pull cars that do not pass its inspections.

---

<sup>2</sup> UTU/GO-386 argues that we should not have begun a declaratory order proceeding given the related pending proceeding before a sister federal agency. But a ruling here will not interfere with the RRB proceeding, which, as noted, is in abeyance pending our ruling. And contrary to UTU/GO-386’s argument, there was no requirement for the entire RRB record to have been filed with us; both AOERC and one of the RRB members submitted evidence for our consideration, and we make our findings here on a well-developed record.

Most of AOERC's employees are part-time seasonal employees such as bartenders, maids, waiters and cooks. AOERC argues that it does not employ traditional rail workers because it provides only non-railroad amenities and services. AOERC states that specially tailored meals, luxury accommodations, and various excursions (including walking tours of historic and natural sites, lectures and live music) are the central features of its vacation packages. Children younger than age 8, and others whose physical needs are incompatible with the restrictions of AOERC's rail cars, are not eligible for the vacation packages. AOERC reserves the right to remove a passenger from its excursion for any reason, and has done so on at least two occasions. AOERC argues that its rail-related service is more in the nature of a moveable hotel or restaurant than a railroad; or that it is more like a sleeping car, express, or private car service, none of which are within the Board's jurisdiction.

### DISCUSSION AND CONCLUSIONS

As noted, the RRB has held up its proceeding to give this Board the opportunity to determine whether AOERC is a rail carrier subject to our jurisdiction under 49 U.S.C. 10501. Under section 10501(a), the Board has jurisdiction over "transportation by a rail carrier" on the interstate rail network.

Parsing this definition, we first examine whether AOERC provides "transportation" (it is clear from its evidentiary submissions that its trips are conducted on the interstate rail network, by means of Amtrak's rights to operate over the trackage). AOERC contends that it is not engaged in the business of transporting persons or property from place to place for compensation, because any transportation actually performed is handled by Amtrak and is under Amtrak's control as provided for in the Amtrak Contract. AOERC argues that, in contrast, it is in the business of providing a unique vacation experience whose primary purpose is not to transport customers but rather to provide accommodations on vintage rail cars and to provide attendant amenities such as fine dining, lectures, concerts, and off-rail tours of local points of interest. To that end, AOERC states, it does not employ traditional rail workers because it provides only non-railroad amenities and services; thus, AOERC's employees are part-time seasonal employees such as bartenders, maids, waiters and cooks. AOERC argues that its customers do not purchase AOERC packages in order to get from the origin to destination, but rather to enjoy the amenities provided by AOERC.

Notwithstanding the fact that AOERC's direct employees are not in typical railroad positions, such as engineers, brakemen, and so forth, AOERC does in our view provide transportation. The term "transportation" is broadly defined under 49 U.S.C. 10102(9) to include "a car . . . related to movement of passengers by rail," and "services related to that movement."<sup>3</sup> While Amtrak provides the motive power and train and engine crews to move

---

<sup>3</sup> Section 10102(9) states that "transportation" includes—

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

AOERC's consists, AOERC provides the rail cars and provides services to passengers that are related to the passengers' movement. Thus, AOERC's operations meet the definition of "transportation." To be sure, transportation is not the only service, and perhaps not even the dominant service, that AOERC offers. But it clearly is a part— and not a trivial part— of AOERC's vacation packages. These vacation packages would plainly be less desirable if AOERC offered all of its amenities while its cars remained fixed at one location. Moreover, the statute does not require that transportation encompass movement from an origin to destination as its sole or main purpose, only that movement be involved. 49 U.S.C. 10102(9), 10501(a)(2).

We next examine whether AOERC is a "rail carrier." In 49 U.S.C. 10102(5), the term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." We first consider whether AOERC provides "railroad" transportation. The term "railroad" is defined at 49 U.S.C. 10102(6).<sup>4</sup> While AOERC concedes that its service might meet the statutory definition of "transportation" (Pet. at 20 n.10), AOERC asserts that it is not involved in "railroad" transportation, as the term "railroad" is defined in 49 U.S.C. 10102(6), because it does not own or operate any of the equipment, road, or facilities listed in this statutory provision. But the term "railroad" embraces not only road owned and operated directly, but also road operated under an agreement. 49 U.S.C. 10102(6)(B). AOERC's arrangement with Amtrak is such an agreement. Indeed, AOERC's arrangement with Amtrak appears to provide that Amtrak pays the railroads over whose track it runs a different rate when the track is used for AOERC service than the rate it pays when the track is used for Amtrak service. Because the operations are conducted on AOERC's behalf, AOERC can be considered as providing railroad transportation.

Accordingly, the issue is whether AOERC is a "common carrier." There is no statutory definition of the term "common carrier." However, as a general matter, the term "common carrier" is a well-understood concept arising out of common law, and it refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation. See Stimson Lumber v. Kuykendall, 275 U.S. 207, 211 (1927); Pennsylvania R. Co. –Merger– New York Central R. Co., 347 I.C.C. 536, 549 (1974) (Penn. R. Co.); Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973).<sup>5</sup> In determining whether there has been a holding out, "one must look to the character of the service of the party in relation to the public." Penn. R. Co. at 549.

---

<sup>4</sup> Section 10102(6) provides that "railroad" includes—

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and
- (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

<sup>5</sup> See also Black's Law Dictionary 205 (7th ed. 1999): "*common carrier*. A carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid."

AOERC asserts that its business practices demonstrate that it does not serve or hold itself out to serve the general public. AOERC states that children younger than age 8, and others whose physical needs are incompatible with the restrictions of AOERC's rail cars, are not eligible for its vacation packages. AOERC further argues that it targets its tour packages to a small subset of vacationers that meet its strict eligibility criteria. But these practices do not shield AOERC from characterization as a common carrier. A common carrier need not hold itself out to serve all business at all times; rather, it may establish a business niche, as AOERC has done here.<sup>6</sup> While AOERC only targets a subset of the public, it nevertheless holds itself out to the groups to which it markets its services.

AOERC claims that its service most resembles that of a hotel or restaurant. Because its food and lodging services move from place to place, however, AOERC's operations appear to us to be more like those of a cruise ship operator – which is considered a common carrier<sup>7</sup> – than those of a mere restaurant or hotel.<sup>8</sup> Like AOERC's railroad cars, cruise ships travel from one place to another<sup>9</sup> (or, sometimes, they simply go to sea and return, in the well-known “cruise to nowhere”). Also, just as passengers on AOERC's excursions enjoy fine dining, luxury accommodations, and attendance at lectures and performances on board, so cruise ship passengers engage in activities and use of the ship's facilities such as dining, gambling, dancing, exercising, attending shows, and shopping. And cruise ship passengers may tour the ports of call to which they are transported by the ship, just as AOERC passengers may take walking tours and enjoy attractions at intermediate stops along the excursion route.

---

<sup>6</sup> See Steere Tank Lines, Inc. v. ICC, 675 F.2d 103, 105 (5th Cir. 1982).

<sup>7</sup> See American Ass'n of Cruise Passengers v. Cunard Line, 911 F.2d 786, 792 (D.C. Cir. 1990) (unless operating solely between foreign ports, cruise ships are common carriers under Shipping Act of 1984); Petchem, Inc. v. Canaveral Port Auth., 1985 WL 148954 (F.M.C.) (1985) at \*12 (same). See also Doe v. Celebrity Cruises, 145 F.Supp.2d 1337, 1344 n.5 (S.D. Fla. 2001) (determining appropriate liability standard for common carrier); Shultz v. Florida Keys Dive Center, Inc., 224 F.3d 1269, 1273 (11th Cir. 2000) (citing cases finding cruise ships to be common carriers); Morton v. De Oliveira, 984 F.2d 289, 292 (9th Cir. 1993) (determining appropriate liability standard for common carrier); Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1334 (11th Cir. 1984) (ship, as common carrier, owes special duty to passengers to provide comfortable accommodations).

<sup>8</sup> AOERC's operations are also similar in some ways to those of tour bus operators, which were historically considered to be common carriers subject to the jurisdiction of the Board's predecessor agency, the Interstate Commerce Commission (ICC). See, e.g., Petition for Declaratory Order–Executive Coach Serv., Docket No. MC-C-10095, 131 M.C.C. 706, 1979 MCC Lexis 18 (1979). Tour bus operators offer amenities to their passengers which, while more minimal in scope than are offered by AOERC, nonetheless distinguish tour buses as a discrete subset of motor common carrier service. The services offered by these companies—as a more luxurious form of bus transportation—are analogous in some ways to those offered by AOERC as a more luxurious form of passenger rail than Amtrak.

<sup>9</sup> The lack of regular schedules or regular routes does not mean that AOERC is not a common carrier. Whether a carrier offers scheduled service is one factor to be examined, but it is not determinative of common carriage. R.C. Serv., Inc. v. Kende Leasing Corp., 1985 U.S. Dist. Lexis 17351 at \*5 (N.D. Ill. 1985). The Federal Maritime Commission has found that an entity may be a common carrier without regular calls at ports, regular sailings, or even sailing schedules. Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc., 9 F.M.C. 56, 63 (1965).

AOERC argues that it is not a common carrier because any services that may involve common carriage are provided by Amtrak. But the ICC found that Auto-Train (at the time it was established, before it became part of Amtrak) was a common carrier. See Auto-Train, Rail Passenger & Auto Transport Serv., 342 I.C.C. 533 (1971). Like AOERC, Auto-Train depended at least in part on services and facilities being provided to it by the freight railroads. And, like AOERC, Auto-Train was solely responsible for making reservations and selling tickets, and its customers looked to it as the service provider.

AOERC also argues that its operations are similar to those of sleeping car, express, car service, and private car companies, which are not subject to the Board's jurisdiction. We disagree. To obtain sleeping car services, passengers purchased tickets directly from the railroad for the underlying movement between origin and destination and then separately contracted with a sleeping car company for the accommodations that company provided;<sup>10</sup> here, by contrast, AOERC appears to be the only entity with which the customer makes arrangements. AOERC is also not like an express company, which historically provided an expedited service rendered on passenger trains for transportation of freight requiring quick transportation.<sup>11</sup> Nor is AOERC like a car service company, which leases its equipment to a railroad for that railroad's use.<sup>12</sup> Here, Amtrak moves AOERC's consists but AOERC is the party using the cars.

Finally, AOERC likens itself to a private carrier because it transports only a small number of passengers, it individually contracts with each passenger for his or her transportation, and, on occasion, a company such as Subaru has chartered an AOERC excursion. However, unlike a private carrier, AOERC's primary operations do not consist of carrying its own goods or personnel;<sup>13</sup> rather it offers transportation to the public, even if it is only to a segment of the public as discussed above.

In sum, we find that AOERC meets the definition of a "common carrier" that provides "transportation by a rail carrier" on the interstate rail network. AOERC is thus a "rail carrier" subject to our jurisdiction under 49 U.S.C. 10501(a). Some of the parties that filed comments in this case appeared to be concerned that a Board finding that AOERC is a common carrier could have broad consequences for the private car industry. We recognize this concern, and we note that this holding is limited to the particular facts of this case, and indicates no intention by the Board to alter the status of private car owners that attach cars to an Amtrak train or locomotive.

---

<sup>10</sup> See, e.g., Pullman Co. v. Linke, 203 F.1017, 1019 (S.D. Ohio 1913); Calhoun v. Pullman Co., 159 F. 387, 389 (6th Cir. 1908).

<sup>11</sup> Coordination of Motor Transp., 182 I.C.C. 263, 348 (1932).

<sup>12</sup> See, e.g., Edwards v. Pacific Fruit Express Co., 390 U.S. 538, 539 (1968); United States v. ICC, 265 U.S. 292, 293-94 (1924).

<sup>13</sup> See, e.g., S.D. Warren Co.-Acquisition & Operation Exemption-Maine Cent. R.R., STB Finance Docket No.34133, at 2 (STB served Sept. 30, 2002).

This decision is limited to the particular circumstances attending AOERC's operations, as described in this proceeding.

Our finding that AOERC is a rail common carrier subject to our jurisdiction does not mean that we must fully regulate its operations. On our own motion, we will exempt AOERC from the Board's licensing regulation under 49 U.S.C. 10901, for its operations.<sup>14</sup> Requiring AOERC to come to the Board for authority would place an unnecessary burden on it.

It is ordered:

1. The motion to strike AOERC's reply is denied.
2. AOERC's petition for declaratory order is granted.
3. AOERC is exempted, pursuant to 49 U.S.C. 10502, from application of Board regulation under 49 U.S.C. 10901.
4. This proceeding is discontinued.
5. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary

---

<sup>14</sup> See, e.g., Minnesota Zephyr Limited.-Operation Exemption-Between East of Hudson, WI, and Minneapolis and Duluth Junction, MN, Finance Docket No. 31924 (ICC served Apr. 17, 1992); Horsehead Corporation-Petition for Acquisition and Operation Exemption-Chestnut Ridge Railway Company, STB Finance Docket No. 34481 (STB served Mar. 12, 2004); Exem. of Freight Forwarders from Tariff Filing Requir., 2 S.T.B. 48 (1997).